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OFFICE OF THE CLERK
SUPREME COURT U.S.

81 6665

IN THE

SUPREME COURT OF THE UNITED STATES

RAYMOND EDWARD JAMES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Raymond Edward James, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit, filed on April 9, 1982 (see attached Appendix "A").

OPINION BELOW

The Opinion of the Court of Appeals is attached as Appendix "A".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I.

Did the Circuit Court misread Rule 4(a), Fed. R. App. P. when it dismissed his appeal for lack of jurisdiction?

II.

Can petitioner be deprived of appellate review of a Rule 35 denial when the District Court failed to act within the 120-day time period, something petitioner has no control over?

III.

Did petitioner have his due process rights violated when his Rule 35 motion was decided by a Judge other than his sentencing Judge, who was still a member of the federal judiciary and was a member of the District of Oregon bench by designation of the Chief Judge of the Circuit?

IV.

Can petitioner be denied appeallte review after the time for appeal has lapsed for reasons that are not within the control or purview of the petitioner?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Petitioner was convicted of an indictment of armed bank robbery in violation of 18 U. S. C. § 2113(d) and 2. [1] Upon conviction by a jury trial he received a twenty year prison sentence to run consecutively to a sentence he was already serving (RT 417-418; CR 126).

This conviction was upheld on direct appeal (Case No. 79-1443) and certiorari was denied by this Honorable Court (Case No. 79-6410).

On January 19, 1981, petitioner filed a timely motion for reduction of sentence pursuant to Rule 35, Federal Rules Criminal Procedure (CR 162). On July 7, 1981, the motion was denied by the Honorable Robert C. Belloni (CR 165).

After not receiving a copy of Judge Belloni's denial order of July 7, 1981, petitioner in late September 1981 became aware of said denial order while obtaining related case materials from the Clerk on another appellate matter.

On September 22, 1981, petitioner filed a Motion for leave to file an out of time appeal of the Rule 35 denial, which was granted on December 10, 1981 by Chief Judge James M. Burns (see attached Appendix "B").

On January 4, 1982, the Notice of Appeal (prepared by the District Court Clerk at Judge Burns" instructions) was docketed in the United States Court of Appeal for the Ninth Circuit (Docket No. 81-1772).

On February 17, 1982, the government filed a motion with the Circuit Court requesting this case be consolidated with No. 81-1802, another appeal arising from the same conviction pursuant to Rule 41(e), Federal Rules Criminal Procedure.

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1. As used hereafter, "CR" denotes the Clerk's record; "RT" denotes the trial transcript; and "G.Br." denotes the government's brief on appeal.

On February 24, 1982, the Circuit Court granted the Motion to consolidate the two appeals (Nos. 81-1772 & 81-1802). Petitioner did not object to this consolidation.

On March 1, 1982, the government filed its brief for Plaintiff-Appellee in both appeals.

Petitioner did not file any reply briefs in this matter.

On April 9, 1982, two jurists of the Circuit Court Order the appeal in 81-1772 dismissed for lack of jurisdiction (see attached Appendix "A") and it is from this Order that petitioner moves this Honorable Court for a writ of certiorari.

ARGUMENT

I.

DID THE CIRCUIT COURT MISREAD RULE 4(A), FED. R. APP. P. WHEN IT DISMISSED HIS APPEAL FOR LACK OF JURISDICTION?

Petitioner contends the Circuit Court misread the intent of Rule 4(a), Fed. R. App. P. when it dismissed his appeal for lack of jurisdiction. The court below has erroneously relied on Pettibone v. Cupp, 666 F. 2d 333 (9th cir. 1982), a case which bears no similarity whatsoever to petitioner's circumstances. In Pettibone (supra) the court was dealing with a state prisoner who, having received the denial order of the District Court, failed to file a timely appeal to the Circuit Court. This was a habeas corpus matter, which is entirely dissimilar from a Rule 35 motion. And in Pettibone)supra) the government objected to the untimely filing of said appeal. Hence, the Circuit Court denied same for lack of jurisdiction, and properly so.

But here we have an instance of where the Chief Judge of the District, realizing petitioner had never received a copy of any Rule 35 denial order, granted a motion for petitioner to file an untimely appeal, and even had the District Court clerk file the Notice of Appeal in petitioner's behalf. Also the Government did

not contest the Court's findings in allowing said untimely appeal (see attached Appendix "C").

Rule 4(a), Federal Rules of Appellate Procedure is quite plain in its language. It states:

> Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired it shall be made by motion with such notice as the court shall deem appropriate.

Petitioner contends the key words to this rule are "excusable neglect." The court below ruled the District Court lacked the authority to extend the time for filing an appeal. This after the government did not even contest the District Court's decision. It is obvious that Judge Burns discovered that petitioner had never been served with a copy of the Rule 35 denial order [Appendix "B"] and the only just remedy was to permit an untimely appeal to the Circuit Court.

II.

CAN PETITIONER BE DEPRIVED OF APPELLATE REVIEW OF A RULE 35 DENIAL WHEN THE DISTRICT COURT FAILED TO ACT WITHIN THE 120-DAY TIME PERIOD, SOMETHING PETITIONER HAS NO CONTROL OVER?

Petitioner contends this is a case of first impression on this issue inasmuch as this issue has never been resolved by the nation's highest tribunal. Various Circuits around the country interpret Rule 35 in different ways, some literal interpretations and some liberal interpretations. But petitioner contends that no prisoner should be penalized because of the inaction of the District Court on a Rule 35 motion.

The very mixed reviews of the Ninth Circuit on this issue need resolution by a higher and final authority. Petitioner finds it

remarkable that the same Judge of the Ninth Circuit, Judge Choy, has ruled in this matter twice, stating exactly the opposite on both occasions. In United States v. United States District Court, C.D.California, 509 F. 2d 1352, 1356 (9th Cir. 1975) he ruled that a District Judge could go beyond the 120-day time limit set by Rule 35 in deciding such a motion, stating that the time limit was flexible. Yet in United States v. Smith, 650 F. 2d 206, 209 (9th Cir. 1981) we find Judge Choy stating exactly the opposite, that tne time limit is inflexible and after 120 days the district judge loses jurisdiction to rule on such a motion. There is no explanation for this major inconsistency.

In petitioner's case the government pointed out, and aptly so, that the six month delay in answering his Rule 35 motion was unreasonable because there was nothing unusual or complex about the motion nor were any hearings or additional evidence required to enable the Court to expeditiously pass upon same. It should also be noted that the government never even bothered to file an answer opposing the Rule 35 motion in this case. Hence the extraordinary length of time between petitioner's timely application and the court's untimely answer remains a mystery.

Petitioner contends it would be a manifest injustuce to penalize him for the court's ineptitude.

III.

DID PETITIONER HAVE HIS DUE PROCESS RIGHTS VIOLATED WHEN HIS RULE 35 MOTION WAS DECIDED BY A JUDGE OTHER THAN HIS SENTENCING JUDGE, WHO WAS STILL A MEMBER OF THE FEDERAL JUDICIARY AND WAS A MEMBER OF THE DISTRICT OF OREGON BENCH BY DESIGNATION OF THE CHIEF JUDGE OF THE CIRCUIT?

Petitioner contends that his constitutional rights were denied when a judge other than the trier of fact in his case, the Honorable Otto R. Skopil, Jr., ruled upon his Rule 35 motion. The government erroneously argued in the court below that Judge Skopil

was no longer available nor a member of the District Court bench at the time of appellant's Rule 35 motion. However, the facts are that Judge Skopil was appointed to the Ninth Circuit bench on September 26, 1979, but sought and received designation from Chief Judge Browning of the Ninth Circuit to the District of Oregon bench. Petitioner contends that only the trier of fact and sentencing judge, in this case Judge Skopil, could render a fair and informed decision on the Rule 35 motion. 8A Moore's Federal Practice § 35-4 and 35.04; United States v. Williams, 613 F. 2d 573; United States v. Harper, 460 F. 2d 1024. It is improper for any judge other than the sentencing juige to rule on such a motion. United States v. Hamner, 496 F. 2d 917.

Petitioner would point out that prior to dismissal of his appeal in the court below this was the key issue raised in the Circuit Court, and that the matter should have been resolved at that level.

IV.

CAN PETITIONER BE DENIED APPELLATE REVIEW AFTER THE TIME FOR APPEAL HAS LAPSED FOR REASONS THAT ARE NOT WITHIN THE CONTROL OR PURVIEW OF THE PETITIONER?

When petitioner discovered that his Rule 35 motion had been denied and he had not even been notified by the District Court he immediately initiated a formal complaint with the Administrative Office of the United States Courts, who in turn contacted the Clerk of the District Court for a full report on the matter (see attached Appendices "D" & "E"). At the same time petitioner moved the District Court for permission to file an untimely appeal. Evidently the Chief Judge of the District felt petitioner's claim had merit, because he even had the court clerk prepare and file the Notice of Appeal with the Circuit Court.

Petitioner contends that it violates his due process rights

to deny him appellate review, ostensibly because of lack of jurisdiction, when he never had a fair and equal opportunity to file a timely appeal, due to the blunder of a deputy clerk of the District Court. While not of the same magnitude, petitioner can see a condemned person going to meet his maker because a court.clerk failed to transmit a stay of execution order to the penal officials. The same rationale applies here. One cannot appeal from a denial order he is unaware of! To expect petitioner to meet such exacting and ridiculous standards strains the bounds of credulity.

CONCLUSION

Petitioner prays this Court will grant certiorari and hear the matter of first impression herein, or order the matter back to the Circuit Court with instructions to hear the Rule 35 matter on the merits.

DATED this 3rd day of May, 1982.

Respectfully submitted,

Raymond Edward James

RAYMOND EDWARD JAMES
Petitioner, Pro Se

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MAY 6 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RAYMOND EDWARD JAMES,
Petitioner,

vs.

UNITED STATES

Petitioner, Raymond Edward James, who is now held in a Federal Correctional Institution, asks leave to file the attached petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this motion is attached hereto.

Raymond Edward James
Petitioner, Pro Se

RECEIVED
MAY 6 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

81 6665

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RAYMOND EDWARD JAMES,
Petitioner,

vs.

UNITED STATES

I, Raymond Edward James, depose and say that I am the petitioner in the above-entitled cause, and, in support of my application for leave to proceed without prepayment of costs or fees, state:

1. Because of my poverty I am unable to pay the costs of said cause.

2. I am unable to give security for same.

3. I believe that I am entitled to the redress I seek in said cause.

4. The nature of said cause is briefly stated as follows:

I was sentenced to the custody of the United States Attorney General by the United States District Court for the District of Oregon. That conviction was upheld on appeal to the Ninth Circuit Court of Appeals and this Honorable Court. Following denial of certiorari in October 1980 [Case No. 79-6410] I filed a timely motion for reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure. Because my sentencing judge had been elevated to the Ninth Circuit during the tenure of my direct appeal the Rule 35 was acted upon by another District Judge, who entered an order denying same on July 7, 1981. Through some mix-up petitioner was never provided with a copy of that order. Months later, through another inquiry to the District Court, petitioner then learned of the Rule 35 denial and immediately petitioned the Chief Judge of the District to file an untimely appeal of said order to the Ninth Circuit. The Chief Judge granted leave to file and petitioner immediately did so. After docketing same, permitting petitioner to file his brief and the government to respond, the Ninth

Circuit dismissed same for lack of jurisdiction (see attached Appendix "A").

I feel the denial of appeal of the Rule 35 matter violated my constituional rights to due process of law and equal protection of the laws as enunciated in the Fifth Amendment to the Constitution of the United States.

Raymond Edward James
Petitioner, Pro Se

I declare under penalty of perjury, that the foregoing is true and correct.

Executed this 3rd day of May, 1982.

Raymond Edward James
Petitioner, Pro Se

FILED
APR 9 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. RAYMOND EDWARD JAMES, Defendant-Appellant.	)	No. 81-1772 DC# CR 78-223-1-RCB Oregon (Portland)
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. RAYMOND EDWARD JAMES, Defendant-Appellant.	)	No. 81-1802 DC# CR 78-223-1-JMB Oregon (Portland) ORDER

Before: WRIGHT and SCHROEDER, Circuit Judges

The Court observes that appellant's Rule 35 motion was denied on July 7, 1981 and that appellant did not file a motion to take a late appeal until September 28, 1981. The district court therefore lacked authority to extend the time for filing an appeal. See Pettibone v. Cupp, 666 F.2d 333 (9th Cir. 1982).

This Court's order of February 24, 1982, consolidating these appeals, is vacated. Case number 81-1772 is dismissed for lack of jurisdiction. Fed. R. App. P. 4(a). Case number 81-1802 will be decided in due course.

CR CAL 4/5/82

APPENDIX "A"

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
DEC 10 1981
ROBERT M. CHRIST, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CRIMINAL NO. 78-223
RAYMOND EDWARD JAMES, Defendant,	)	NOTICE OF APPEAL

Defendant Raymond Edward James hereby appeals to the Court of Appeals for the Ninth Circuit from the Order denying his Motion for Modification of Sentence entered herein on July 7, 1981.

DATED: December 10, 1981.

ROBERT M. CHRIST, CLERK

by Iris K. Reilly

Deputy Clerk

APPENDIX "B"

for the crime (RT 243-244, 247, 292, 295; G. Ex. 15, 15 A, 15 B, 15 C, 16, 16 A, 17-23, 23 A, 23 B, 23 C, 23 D, 24-27).

III.

DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE WAS PROPERLY DENIED. (CASE NO. 81-1772)

On January 19, 1981, defendant filed a motion for reduction of sentence pursuant to Rule 35, Federal Rules Criminal Procedure (CR 162; D.Br. No. 81-1772, p. 2). On July 7, 1981, the motion was denied by the Honorable Robert C. Belloni (CR 165; D.Br. No. 81-1772, p. 2).[7/8/]

It is settled that a motion for reduction of sentence rests with the sound discretion of the trial Court and is, in effect, a plea for mercy. Accordingly, the reviewing courts will not substitute their judgment for that of the Court below. United States v. Kohlberg, 472 F.2d 1189, 1190 (9th Cir. 1973); United States v. Smith, 650 F.2d 206, 209 (9th Cir. 1981); United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973); United States v. Hallinan, 103 F.Supp. 800, 801 (N.D. Cal. 1952).

Denial of the motion in the present case was entirely appropriate. See the Presentence Investigation Report in the underlying criminal case

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7/ During the pendency of James' direct appeal from his underlying conviction, Judge Skopil, who presided during the trial, was named to the Court of Appeals for this Circuit (D.Br. No. 81-1772, p. 2). As a consequence, the motion for reduction was assigned to Judge Belloni who had heard certain of the pretrial matters and had served as the trier of fact in the case of James' co-defendant Roy Wickham (CR 164). See footnote 2 (supra).

8/ Although James' notice of appeal from the denial of his motion was not timely filed, Chief Judge James M. Burns found he had not received notification of Judge Belloni's July 7, 1981, order and thus authorized late filing of the notice (CR 171; D.Br. No. 81-1772, pgs. 2-3). The Government does not contest the Court's findings.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
516 UNITED STATES COURTHOUSE
620 S. W. MAIN
(S. W. BROADWAY & MAIN)
PORTLAND, OREGON 97205

ROBERT M. CHRIST
CLERK
DONALD M. CINNAMOND
CHIEF DEPUTY

(503) 221-2202
FTS 423-2202

September 30, 1981

Mr. Neil W. Imus
Clerks Division
Administrative Office of
the United States Courts
Washington, D. C. 20544

Dear Mr. Imus:

Re: USA v. Raymond Edward James;
No. CR 78-223

I am responding to your request for information concerning the statements made by Mr. James in his letter dated September 22, 1981, addressed to Mr. Roger D. Foley. I assume that Mr. James intended to direct his letter to Mr. William E. Foley, Director of the Administrative Office.

I have enclosed a photocopy of the original order in question, signed by Judge Belloni on July 7, 1981 and entered on the docket of the case that day. You will note that the handwritten symbol "ntfd" appears next to the file stamp. In accordance with our long standing office procedure, the person who receives a signed order from a judge, generally this is an incourt deputy, assumes the responsibility of notifying the parties of the entry of the order. This is commonly done by making a sufficient number of photocopies of the order and mailing a copy to each attorney or party appearing in propria persona in the case. When the mailing is completed, that deputy makes the notation in the manner it appears on this order.

I personally discussed this situation with the deputy who made the notation here. She has no independent recollection of the actual mailing of the copies in this instance, however, she has been employed as a deputy clerk in this office for over 10 years, and she has followed this notification procedure

APPENDIX "D"

on countless occasions. After sincere reflection, she can think of nothing that was unique about this order. Nothing comes to her mind that would have caused deviation from the usual practice.

You inquired about the absence of a notation on the docket sheet showing the mailing of a notice of entry or copy of the order. It has not been our practice to make such notations on docket sheets in criminal cases.

Based on my review of this entire situation, I can only conclude that our regular procedure was followed. I can give you no explanation for Mr. James' failure to receive the copy.

Very truly yours,

ROBERT M. CHRIST, CLERK

RMC:laa

Enclosure

APPENDIX "D"

U. S. DISTRICT COURT
DISTRICT OF OREGON
FILED
JUL 7 1981
ROBERT M. CHRISTI, CLERK
BY dal DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	CRIMINAL NO. 78-223
	)	
RAYMOND EDWARD JAMES,	)	ORDER
	)	
Defendant.	)	

Defendant's Motion for Modification of Sentence is denied. The sentence which defendant received was and continues to be an appropriate one.

DATED: July 7, 1981.

United States District Judge

APPENDIX "D"

ORDER

CERTIFICATE OF SERVICE

Raymond Edward James, petitioner hereinbefore, hereby certifies that he did cause to be placed in the United States mails at Butner, North Carolina, postage prepaid, one copy of the foregoing application, addressed to:

Solicitor General
Department of Justice
Washington, DC 20530

Done this 3rd day of May, 1982.

Raymond Edward James

RAYMOND EDWARD JAMES
Petitioner, Pro Se

No. 81-6665

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

RAYMOND EDWARD JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 81-6665

RAYMOND EDWARD JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the court of appeals erred in dismissing as untimely his appeal from the denial of a motion to reduce his sentence. He seeks as relief either this Court's plenary consideration of his underlying claim on appeal (which the court of appeals did not reach) or vacation of the court of appeals' dismissal of his appeal and remand to that court for disposition by it on the merits. We do not oppose vacation of the judgment of dismissal and remand to the court of appeals.

1. Following a jury trial in the United States District Court for the District of Oregon, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(d). He was sentenced to a 20-year term of imprisonment, to run consecutively to a sentence he was serving on an unrelated offense. The court of appeals affirmed in an unpublished memorandum order, United States v. James, 614 F.2d 777 (9th Cir. 1980), and this Court denied a petition for a writ of certiorari on October 6, 1980 (449 U.S. 846).

On January 19, 1981, petitioner filed a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35. The district court denied the motion on July 7, 1981 (Pet. App. D). Petitioner, however, alleges that he did not receive notice of the district court's action until September 1981. At that time, he requested leave of the district court to file an out-of-time appeal from the denial of his motion for reduction of sentence. On December 9, 1981, the district court granted petitioner leave to appeal out-of-time (App. A, infra), and a notice of appeal was filed on petitioner's behalf on December 10, 1981 (Pet. App. B).[1/]

The court of appeals dismissed petitioner's appeal for lack of jurisdiction because of its untimeliness (Pet. App. A).[2/] On April 13, 1982, petitioner addressed a letter to Circuit Judge Wright, which petitioner requested be construed as a motion to reopen the appeal from the denial of his Rule 35 motion (App. B, infra). The court of appeals, construing the letter according to petitioner's request, denied reconsideration on the same jurisdictional ground (App. C, infra).

1/ The clerk of the district court has explained that the "long standing" procedure followed by the employees in his office is to place the notation "ntfd" next to the file stamp on the original order once notice of the entry of the order or copies of the order itself have been sent to the parties to the case (Pet. App. D). The handwritten "ntfd" symbol does appear on the copy of the original order at issue in this case (ibid.). The clerk further stated that the deputy clerk who made the notation in this case had been employed in his office for more than ten years and that she had followed the notification procedure "on countless occasions." Although she had "no independent recollection of the actual mailing of the copies in this instance," she recollected nothing "that would have caused deviation from the usual practice." Ibid.

The records of the United States Attorney's Office do not, however, indicate that that office received notice or a copy of the order denying petitioner's motion for reduction of sentence at or around the time it was entered. On appeal, the government did not contest the district court's apparent finding that petitioner had not received notice of the denial of his Rule 35 motion (Pet. App. C). Nor did it seek dismissal of petitioner's appeal as untimely. The court of appeals dismissed the appeal for lack of jurisdiction sua sponte.

2/ Petitioner's appeal from the denial of his Rule 35 motion had been consolidated with an appeal from the denial of another motion by him seeking the return of allegedly illegally seized property, pursuant to Fed. R. Crim. P. 41(e). The latter appeal is still pending.

2. Fed. R. App. P. 4(b) provides that a notice of appeal by a defendant in a criminal case must be filed within 10 days after entry of the judgment or order of which review is sought.3/ Rule 4(b) further provides a 30-day extension of time for filing a notice of appeal in a criminal case "[u]pon a showing of excusable neglect." It is settled, however, that the 30-day "grace period" permitted by Rule 4(b) may not be extended. United States v. June, 503 F.2d 442, 443-444 (8th Cir. 1974); United States v. Hoye, 548 F.2d 1271, 1273 (6th Cir. 1977). Accordingly, petitioner's notice of appeal, filed 156 days after the denial of his motion to reduce sentence, failed to confer jurisdiction over his appeal.4/

We recognize that dismissal of an appeal is an extremely harsh result where the reason for the untimeliness of the notice of appeal was the failure of the appellant to receive timely notice of the action of the district court of which he seeks review.5/ Nevertheless, in view of this Court's holdings to the effect that the filing of a notice of appeal within the prescribed time is "mandatory and jurisdictional," it is not clear to us that any other option was available to the court of appeals. United States v. Robinson, 361 U.S. 220, 224, 229 (1960). See also Temple v. United States, 386 U.S. 961 (1967)

3/ The court of appeals erred in treating petitioner's motion to reduce sentence pursuant to Fed. R. Crim. P. 35 as a civil proceeding governed by Fed. R. App. P. 4(a). See Heflin v. United States, 358 U.S. 415, 418 n.7 (1959); United States v. Bedrosian, 631 F.2d 583 (8th Cir. 1980); United States v. Guiterrez, 556 F.2d 1217 (5th Cir. 1977); McCartney v. United States, 382 F.2d 116, 118 (9th Cir. 1967); Klink v. United States, 308 F.2d 775, 776 (10th Cir. 1962).

4/ Even if petitioner's motion for leave to file an out-of-time appeal were construed as a notice of appeal it would be inadequate, since neither it nor the actual notice of appeal was filed within 40 days after the district court's denial of petitioner's motion for reduction of sentence, as required by Fed. R. App. P. 4(b).

5/ We note, however, that such a result could be avoided by the prospective appellant's checking the docket sheets or (in the case of an incarcerated defendant) inquiring of the district court clerk's office approximately every 30 days.

(denial of petition for writ of certiorari); Berman v. United States, 378 U.S. 530 (1964) (per curiam). With respect to the specific facts of the present case, that conclusion is bolstered by Fed. R. Crim. P. 49(c), which expressly provides that "[l]ack of notice of the entry [of an order made on a written motion subsequent to arraignment] by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure." Cf. Weldon v. Gaden, 419 F.2d 303, 307-308 (D.C. Cir. 1969).6/

3. However, one commentator has suggested that "it is theoretically possible that in a case in which no notice was sent and 40 days elapsed after entry of the order the Supreme Court might hold that despite [Fed. R. Crim. P. 49(c)], entry of the judgment for purposes of appeal was incomplete without notice" (9 Moore's Federal Practice, ¶204.04 at 4-20 (footnote omitted)).

Alternatively, this Court has held that in certain "unique circumstances" (Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962)) an appellate tribunal may hear an appeal that was not filed within the prescribed time limits. See id. at 4-16 to 4-18. In Fallen v. United States, 378 U.S. 139 (1964), the Court held that a notice of appeal mailed by an incarcerated defendant eight days after sentencing, which "in the normal course of events [would] have been received by the clerk within the [required] 10 days" (id. at 143), but which in fact was not received in the clerk's office until 14 days after

---

6/ In denying petitioner's motion for reconsideration, the court below indicated that petitioner could file another Rule 35 motion and, if it were denied, take a timely appeal therefrom (App. C, infra). The court of appeals' suggestion is without legal foundation, however, since Rule 35 does not permit consideration of successive motions filed outside the 120-day period. See United States v. Hetrick, 644 F.2d at 752, 756 (9th Cir. 1981).

sentencing, would be considered timely.7/ Noting (ibid.), inter alia, that mail pickups at the prison in which the appellant was incarcerated occurred only twice a week, this Court concluded (id. at 144) that the appellant "had done all that could reasonably be expected to get the letter to its destination within the required 10 days." Accordingly, the Court "decline[d] to read the Rules so rigidly as to bar a determination of his appeal on the merits" (ibid.).

Similarly, the appellant in Thompson v. INS, 375 U.S. 384 (1964), an alien seeking naturalization, filed motions for a new trial and to amend certain findings of fact 12 days after entry of the final order denying his petition for naturalization. At that time, the district court erroneously assured the appellant specifically that his motions were made "'in ample time'" (id. at 385). The motions were denied five and one-half months later. The appellant's notice of appeal was filed within 60 days of the denial of his post-trial motions, but not within 60 or even 90 days after the original entry of judgment.8/ The court of appeals granted the government's motion to dismiss the appeal on the grounds that the notice of appeal had not been filed within the prescribed 60-day period and that because the appellant's post-judgment motions had not been timely they did not toll the running of the time for appeal. Noting (id. at 387) that the appellant had "relied on the statement of the district court and filed the appeal within the assumedly new deadline but beyond the old deadline," this Court vacated the judgment of the court of appeals and remanded the case to it for dispositon on the merits.

7/ Pallen was decided prior to the 1966 amendment to Fed. R. Crim. P. 4(b) that, for the first time, permitted the district courts to extend the time for filing a notice of appeal in a criminal case for an additional 30 days "[u]pon a showing of excusable neglect."

8/ Fed. R. Civ. P. 73(a) then permitted a district court to extend the time for taking an appeal for an additional 30 days "upon a showing of excusable neglect."

Fallen and Thompson, read together, may be explained as standing for the principle that where a litigant could, and presumably would, have taken a timely appeal, but did not do so because of a misrepresentation or other misleading action by the government, his appeal nevertheless will be deemed timely.9/ This analysis would be applicable to the present case as well, since the district court apparently concluded that the clerk's failure to notify petitioner of the denial of his Rule 35 motion resulted in his mistaken belief that no notice of appeal was yet required. Indeed, this Court held in Rosenbloom v. United States, 355 U.S. 80 (1957), that where the government had conceded that the clerk of the district court had failed to notify the appellant of the denial of his timely motion for a new trial and where proceedings held in open court could have been construed as an (albeit unfounded)10/ extension of the time in which an appeal could be taken, the court of appeals erred in dismissing as untimely an appeal filed more than 10 days after entry of denial of the motion.

Fed. R. Crim. P. 49(c), however, which, as noted above (page 4, supra), provides that the failure of the clerk to notify a litigant of the entry of the denial of a motion does not affect the time in which he may appeal therefrom (except as provided for

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9/ Although Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., supra, also has been explained on that ground (9 Moore's, supra, ¶204.04 at 4-16 n.17), it is not necessary to go so far to account for the result reached there. In that case, the court of appeals had dismissed the appeal, which had been filed within an extension of time granted by the district court for "excusable neglect based on a failure of a party to learn of the entry of judgment" pursuant to then Fed. R. Civ. P. 73(a), as untimely on the ground that the district court had erred in finding excusable neglect and, hence, in granting the extension. This Court vacated the judgment of dismissal holding that "great deference" should be accorded by a reviewing court to a lower court's grant of an extension in which to take an appeal "[i]n view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period [within which an appeal in a civil case could be taken as a matter of right] and then suffers reversal of the finding" (371 U.S. at 217). Harris Truck Lines is distinguishable from the present case (as well as from Fallen and Thompson, supra) because there the notice of appeal at least was filed within the extended time period permitted by the Rules.

10/ See note 7, supra.

in Fed. R. App. 4(b)), was adopted subsequent to this Court's decisions in Rosenbloom, Fallen and Thompson. Indeed, the Advisory Committee's notes on Rule 49(c) specifically mention Rosenbloom. Notwithstanding the obvious possibility that the failure to notify could continue for more than 40 days, the commmittee concluded that "[t]he excusable neglect extension provision in [Fed. R. App. P. 4(b)] will cover most cases where failure of the clerk to give notice of judgments or orders has misled the defendant. No need appears for an indefinite extension without time limit beyond the 30 day period."11/

Accordingly, it remains unclear to us that there was any legal basis available to the court of appeals on which to do anything but dismiss petitioner's appeal. Nevertheless, in view of the "unique circumstances" of this case, we do not oppose the granting of the petition for the purpose of vacating the dismissal of the appeal and remanding the case to the court of appeals for disposition on the merits, as petitioner has requested (Pet. 8).12/

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated and the case remanded to that court for disposition on the merits, or the petition should be denied.

REX E. LEE
Solicitor General

JULY 1982

11/ Similarly, when the district courts first were permitted to extend the time for taking an appeal in a civil case "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment in the district court" (Fed. R. Civ. P. 73(a) (1946)) the extension permitted was limited to 30 days. See Advisory Committee's notes to Fed. R. Civ. P. 73(a).

12/ We submit, however, that the petition should not be granted for the purpose of affording plenary consideration of petitioner's Rule 35 issues, including his underlying claim that his Rule 35 motion should have been disposed of by the court that sentenced him, since those issues have not been passed on by the court of appeals.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 78-223
	)	
RAYMOND JAMES,	)	O R D E R
	)	
Defendant.	)	

On January 19, 1981, defendant filed motion pursuant to Rule 35 to modify his sentence. Thereafter, on July 7, 1981, this motion was denied by Judge Robert C. Belloni. Mr. James claims that he did not receive a copy of the order of July 7, 1981, denying his motion. Mr. James also claims, by letter dated November 4, 1981, to me , that Judge Belloni was prejudiced against him.

Without undertaking to evaluate the validity of Mr. James' assertions against Judge Belloni I grant Mr. James' motion for leave to file an out of time appeal as to the order dated July 7, 1981. This motion was filed September 28, 1981. Accordingly,

It is O R D E R E D that the motion for leave to file a late appeal challenging the order denying the motion to modify the sentence is hereby granted. The Clerk is authorized and directed to file on behalf of Mr. James an appeal of the July 7, 1981, order.

DATED this 9th day of December, 1981.

JAMES M. BURNS
Chief U.S. District Judge

FILE

RECEIVED
APR 19 1982
U.S. ATTORNEY
PORTLAND, ORE.

April 13, 1982

Honorable Eugene A. Wright
United States Circuit Judge
United States Courthouse
1010 5th Avenue
Seattle, WA 98104

Re: United States of America vs. Raymond Edward James,
No. 81-1772, DCF CR 76-223-1-RCB (Oregon/Portland)

Dear Judge Wright:

Once again this frustrated pro se appellant has been shafted by this Court in a manner which defies logic! In the Order of you and Judge Schroeder of April 5, 1982, you have, in essence, re-written Rule 35, Federal Rules of Criminal Procedure, by depriving this appellant his fundamental right to consideration of a timely Rule 35 motion by his sentencing Judge.

If you would get your head out of the sand long enough to listen to some good old common logic, perhaps you could tell me just how I might appeal an order I never received a copy of, which is exactly what happened in this instance?

While in all probability Judge Belloni did deny my Rule 35 motion on July 7, 1981, and while Mr. Robert Christ, District Court Clerk, assures us his deputy clerk followed notification procedures, he cannot assure her independent recollection of the actual mailing of the copies of the Rule 35 denial in this instance. And the fact remains that appellant never received his copy of the denial order until late September!

This case is almost four years old and the record will reflect that this appellant has always strived to be prompt and timely in filing his motions to this Court (and the District Court). But I CANNOT file a timely appeal when a deputy clerk fails to apprise me of the fact that it has been denied! I consider it horrendous that I am to be penalized for the failure of some deputy clerk to mail me my copy of a denial order. This is a gross miscarriage of justice.

Honorable Eugene A. Wright
April 13, 1982

But now I wish to apprise the Court what I construe to be the real reason for dismissing No. 81-1772, ostensibly for lack of jurisdiction. I am firmly convinced that this technicality has been contrived as a ploy to avoid compelling your Ninth Circuit brother, Judge Skopil, to hear my initial Rule 35 motion (as should have been done from the outset). But I do not feel Judge Skopil has had any part of this contrivance. I hold Judge Skopil in the highest respect as an able and just jurist. Unfortunately, I cannot say the same for many of his brothers and sisters on the Ninth Circuit!

Inasmuch as I continue to be an in forma pauperis and pro se litigant I wish this letter to be construed as a motion to re-open No. 81-1772 and reconsolidate ir for consideration with No. 81-1802. To do anything less would be to deprive this appellant of his constitutional rights to due process of law and equal protection of the laws and Federal Rules of Criminal Procedure.

Respectfully yours,

Raymond E. James
#35259-136 (Duke Unit)
Federal Correctional Institution
P. O. Box # 1000
Butner, NC 27509

cc: files
Hon. Mary M. Schroeder
Hon. James R. Browning
Hon. Otto R. Skopil, Jr.
Hon. James M. Burns
Hon. Robert C. Belloni
Mr. Charles H. Turner, Esquire, AUSA

RECEIVED
MAY 03 1982
U.S. ATTORNEY
PORTLAND, ORE.

FILED
APR 29 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. RAYMOND EDWARD JAMES, Defendant-Appellant.	No. 81-1772 DC# CR 78-223-1-RCB Oregon (Portland) ORDER

Before: WRIGHT and SCHROEDER, Circuit Judges

Appellant's letter dated April 13, 1982, is construed as a motion for reconsideration of the Court's order of April 9, 1982. The motion is denied. This Court is without power to extend the time for filing a notice of appeal, and the district court was likewise unable to do so because appellant's motion for extension of time was not filed within the "grace period" allowed by Fed. R. App. P. 4.

The Court notes, however, that successive motions under Rule 35 may be filed. See Heflin v. United States, 358 U.S. 415, 418 n.7 (1959). Appellant may perfect an appeal from denial of such a motion.

4/22/82SP
(CR CAL 4/5/82)